Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services	WC Docket No. 04-29

OPPOSITION OF MCI TO SBC'S PETITION FOR FORBEARANCE

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MCI, Inc. ("MCI") hereby submits this Opposition to the petition for forbearance (the "Petition") filed by SBC in the above-referenced proceeding.

I. INTRODUCTION AND SUMMARY

In its Petition, SBC asks the Federal Communications Commission ("Commission" or "FCC"), pursuant to section 10 of the Communications Act of 1934, as amended (the "Act"),[1] to forbear from applying Title II regulation to "IP platform services" – a category which may include last-mile transmission services over which SBC and other dominant carriers could exercise market power.[2] While MCI agrees that IP applications and content need not be highly regulated, the Commission should

[1] 47 U.S.C. § 160.

[2] Petition of SBC Communications Inc. for Forbearance, WC Docket No. 04-29, at 2 (Feb. 5, 2004) ("Petition"). *See also* Petition of SBC Communications Inc. for a Declaratory Ruling at 1 n.3 (Feb. 5, 2004) ("Declaratory Ruling Petition") (defining "IP platform services" to consist of "(a) IP networks and their associated capabilities and functionalities (*i.e.*, an IP platform), and (b) IP services and applications provided over an IP platform that enable an end user to send or receive a communication in IP format."). In accordance with the Wireline Competition Bureau's instructions, MCI's response to SBC's Declaratory Ruling Petition is set forth in MCI's comments to the *IP-Enabled Services NPRM*, which are being filed today. *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("*IP-Enabled Services NPRM*").

continue to impose dominant carrier regulation pursuant to Title II on the provision of transmission services by carriers with market power. Pursuant to Title II, the FCC has jurisdiction over transmission services.

SBC asks the Commission first to forbear from applying all Title II regulations to all "IP platform services," and then selectively to re-regulate the very same services pursuant to Title I. The Act does not authorize the Commission to regulate in this manner, and even if the Commission had such authority, this exercise would be a tremendous waste of Commission resources. Rather than taking the circuitous and potentially harmful approach advocated by SBC, the Commission should forbear, pursuant to Section 10 of the Act, only from those Title II regulations that are shown to be unnecessary to prevent abuses of market power or to protect consumers.

In taking this approach, the Commission should recognize that the "IP platform services" described by SBC are offered on multiple layers of the IP protocol stack, including the content, application, logical and physical layers.[3] MCI believes that regulators can best promote the public interest by examining each layer separately and targeting economic regulations to those layers where firms exercise market power, while leaving other layers free from such regulation.[4] Contrary to SBC's claim, it is this type of

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[3] *See, e.g.,* Richard S. Whitt, Senior Director for Global Policy and Planning, MCI, "Adapting FCC Policymaking to the Network Layers Model: A Roadmap for FCC Action" at 5 (March 2004) ("*Layers Roadmap*"), attached to *ex parte* letter from Gil Strobel, Counsel for MCI, to Marlene Dorch, FCC, WC Docket No. 04-36, *et al.* (March 29, 2004); Richard S. Whitt, Senior Director for Global Policy and Planning, MCI, "A Horizontal Leap Forward: Formulating a New Public Policy Framework Based on the Network Layers Model" at ii (December 2003) ("*Horizontal Leap*"), *available at*: <http://global.mci.com/about/publicpolicy/presentations/horizontallayerswhitepaper.pdf>.

[4] As discussed in MCI's comments filed today in the *IP-Enabled Services* docket, in a narrowly circumscribed set of circumstances, the FCC may be able to exercise ancillary jurisdiction pursuant to Title I to impose appropriate regulations with respect to layers

targeted regulation (embodied, for instance, in the *Computer II* and *Computer III* rules) – and not a "hands-off policy"[5] – that has led to the openness, innovation, and extraordinary growth that characterize the Internet today. Economic regulation should remain in place as long as it is necessary to constrain SBC and other dominant carriers from exercising their market power in one layer in a manner that undermines competition in other layers.

In particular, SBC and other dominant local exchange carriers ("LECs") continue to wield control over bottleneck last-mile transmission facilities – including facilities used to provide DSL service – upon which Internet service providers ("ISPs") rely to connect end users to the Internet, as well as to provide IP-based content and applications. Rather than make the showing required by section 10, SBC relies on broad, unsupported claims regarding the status of competition for "IP platform services," including IP networks and the IP services and applications provided over those networks. Even if SBC had provided an adequate factual basis for its Petition, at least part of the relief requested by SBC would nonetheless be barred by section 10(d), which prohibits forbearance from sections 251(c) and 271 until the Commission determines those requirements have been "fully implemented."[6]

Because SBC has failed to demonstrate that Title II regulation is no longer needed to ensure that pricing is just and reasonable and not unreasonably discriminatory, and that

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where no market power exists. For instance, even though the applications layer is highly competitive, it may be appropriate for the Commission to impose certain regulations, such as E-911 requirements, on particular applications that are close substitutes for traditional voice service. *See* MCI Comments, WC Docket No. 04-36, at 34-35 (May 28, 2004) ("*MCI's IP-Enabled Services Comments*").

[5] Petition at 10.

[6] 47 U.S.C. § 160(d).

Title II regulation is not necessary to protect consumers in the relevant geographic and customer product markets, the Commission should deny SBC's Petition.

II. THE FUTURE OF THE INTERNET DEPENDS ON CONTINUED ECONOMIC REGULATION OF LAYERS WHERE ONE OR MORE FIRMS ENJOY MARKET POWER

A. The Relief Requested by SBC Is Overly Broad and Would Harm Competition

In its Petition, SBC urges the Commission to adopt a "shoot first, ask questions later" approach to forbearance. Under this approach, the Commission would first forbear from applying *all* Title II regulation to *all* "IP platform services," which SBC broadly defines to include both IP transmission facilities and the applications and content provided over such facilities.[7] Only after having granted this indiscriminate relief would the Commission pause to examine whether the relief was warranted. In particular, if the Commission determined (belatedly) that regulations that formerly applied to "IP platform services" under Title II were still "needed to achieve important public policy objectives,"[8] SBC would have the Commission re-impose those regulations pursuant to the Commission's Title I authority.[9]

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[7] *See* Declaratory Ruling Petition at 28.

[8] Petition at 2.

[9] *See* Petition at 11. In its Petition, SBC asks the FCC to forbear from applying Title II regulation to IP platform services "to the extent that such regulation might otherwise be found to apply." Petition at i. Since SBC's Petition seeks forbearance from Title II regulation, and since Title II applies only to telecommunications services, the forbearance relief requested by SBC necessarily applies only to services classified as telecommunications services. MCI does not here express a view on which elements of "IP platform services" are properly classified as Title I information services, and which elements are properly classified as Title II telecommunications services. Instead, MCI addresses this distinction in its comments to the *IP-Enabled Services NPRM*.

As an initial matter, as explained more fully below, SBC's definition of "IP platform services" improperly conflates the bottleneck networks used to provide IP services with the competitive applications and content that are provided over those networks. The Commission is best served by an analytical framework that reflects the manner in which IP-based services are provided and offers a sound basis for determining what regulations are needed to preserve and promote competition for such services. The Internet "layers" model espoused by MCI and a number of scholars supports regulation of IP-based networks and services in a manner that is consistent with the way engineers view such networks and services.[10]

As the Commission recently observed, the rise of the Internet has "fundamentally changed the ways in which [Americans] communicate by increasing the speed of communication, the range of communicating devices, and the platforms over which they can send and receive."[11] These changes have been facilitated by the novel architecture of IP networks. Whereas historically, particular services were tied to a particular medium, IP-based networks are designed to consist of modular "layers" that allow applications or services to be carried on a variety of physical media. Using IP, multiple services can now be provided over a single medium or network, and a single service can be provided over

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[10] *See MCI's IP-Enabled Services Comments* at 8-9. *See also Layers Roadmap; Horizontal Leap; IP-Enabled Services NPRM* ¶ 37 (2004) ("In recent years, several observers have urged reliance on a 'layered' model to address VoIP and other areas of regulatory concern.") (citing Kevin Werbach, *A Layered Model for Internet Policy* (Sept. 1, 2000) <http://www.edventure.com/conversation/article.cfm?counter=2414930>; Robert M. Entman, *Transition to an IP Environment*, The Aspen Institute (2001); Michael L. Katz, *Thoughts on the Implications of Technological Change for Telecommunications Policy*, The Aspen Institute (2001); Douglas C. Sicker, *Further Defining a Layered Model for Telecommunications Policy* (Oct. 3, 2002) <http://intel.si.umich.edu.tprc/papers/2002/95/LayeredTelecomPolicy.pdf>).

[11] *IP-Enabled Services NPRM* ¶ 8.

multiple media or networks. Indeed, the power of IP lies in part in the fact that it breaks the link between the service and the medium, thereby spurring convergence, competition, innovation, and consumer choice.

As MCI explains in more detail in the comments filed today in response to the *IP-Enabled Services NPRM*, a layers-based approach to regulation is better adapted to the networks of today than is traditional service-based regulation.[12] MCI has proposed that the FCC adopt a simplified layers model consisting of four layers: A content layer; an application layer; a logical layer; and a physical layer consisting of both transport (*e.g.*, point of presence ("POP")-to-POP connections) and access (*e.g.*, last-mile connections between end users and central offices or POPs).[13] As explained in MCI's previously-filed white paper, the content layer contains text, speech, images and video, while the application layer contains applications that use IP data, such as email and web browsing.[14] For purposes of these comments, MCI has further simplified its layers model to include transmission services, including special access and DSL, in the physical layer because the provisioning of such services today is so closely connected to the physical facilities over which they are provided. One advantage of this simplification is that it allows the discussion of the logical layer to focus on the IP functions and highlights the fact that IP functions are between the higher layers (*i.e.*, applications and content) that ride on IP and the lower, physical layer on which the IP protocol rides.[15]

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[12] *See MCI's IP-Enabled Services Comments* at 6-10.

[13] *Layers Roadmap* at 5; *Horizontal Leap* at 26.

[14] *Layers Roadmap*at 5.

[15] Under this layers model, IP networks are viewed as a series of modular layers, with standardized interfaces between layers that allow engineers to make changes to one layer without affecting other layers.

Although SBC pays lip-service to a layers model of the Internet,[16] SBC's Petition ignores at least two core principles of a layers-based approach to regulation: (1) market power should be assessed separately for each layer; and (2) a company with market power in a lower layer should be prohibited from leveraging that power to harm competition in markets that involve upper layers.[17]

Assessing market power separately for each layer. Market power currently exists primarily in the physical network access layer of IP networks (*e.g.*, local access and transport facilities, and local ATM, DSL, and special access services). The Commission should maintain economic regulations on those layers to the extent necessary to prevent the abuse of market power, by, for example, ensuring that entities without market power have access to bottleneck facilities.[18]

Preventing a company from leveraging its market power in a lower layer to harm competition in other layers. In an IP-based environment, the proliferation and survival of innovative applications, services, and content depend on the ability of providers of such applications, services, and content to obtain access to lower layers, including the physical layer. For example, unaffiliated ISPs depend on third-party broadband transmission

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[16] *See* Declaratory Ruling Petition at 10 ("In contrast to the circuit-switched network, the Internet is highly 'modular,' in that particular providers can and do specialize in supplying services on one layer without supplying services on another, and can compete effectively in doing so.").

[17] The ability of a layers-based approach to expose and address market power issues has been recognized by a number of respected scholars writing in this field. *See, e.g.*, Sicker, *supra* note 10, at 9; Entman, *supra* note 10, at 13-14; Katz, *supra* note 10, at 28-29.

[18] *See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, ¶ 229 (1980) ("*Computer II*") (requiring carriers with market power to provide basic transmission facilities to all enhanced services providers on an equal basis as a means of constraining the "potential for abuse of . . . market power through controlling access to and use of the underlying transmission facilities in a discriminatory and anticompetitive manner").

facilities to provide high-speed Internet access. The FCC has long recognized the need to safeguard against the potential for a carrier with market power in an upstream market to leverage its power to harm competition in a downstream market.[19] Similarly, when a carrier has market power in one layer of an IP-based network (*e.g.*, the physical layer), the FCC should safeguard against the potential for that carrier to leverage its market power to harm competition in one or more higher layers (*e.g.*, the application and/or content layers).

SBC erroneously argues that regulation of IP networks or transmission facilities would lead to "regulation of the Internet as a whole" and that the Internet's "future evolution" or "future development" depends on complete non-regulation of IP platforms.[20] In fact, targeted economic regulation of bottleneck transmission facilities would allow the FCC to refrain from imposing economic regulation on the "Internet as a whole." Likewise, the "future evolution" of the Internet does not require complete non-regulation of IP platforms; rather, it depends on a continuation of the FCC's current practice of applying targeted economic regulation to layers that are not competitive (*e.g.*, access transmission services) and not applying economic regulation to layers where competition exists.[21]

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[19] *See, e.g., Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756 (1997) ("*LEC Classification Order*"); *Computer II.*

[20] Petition at 8; Declaratory Ruling Petition at 14, 29.

[21] As noted above, in certain limited circumstances, regulations aimed at fulfilling social policy goals may be appropriate even where competition exists. *See supra* note 4.

The openness, innovation, and extraordinary growth of the Internet that SBC touts[22] are compelling evidence of the success of the Commission's existing policies ensuring nondiscriminatory access to bottleneck facilities for both circuit- and packet-switched services. If the Internet is to continue to thrive and benefit from additional innovation and competition, the FCC must recognize that SBC and other incumbent LECs continue to wield control over bottleneck last-mile transmission facilities. To prevent such control from having anti-competitive effects, the Commission should retain existing rules – and/or implement new rules – that constrain carriers from exercising market power in a manner that undermines competition for IP-based services and applications. The Commission's rules should continue to promote innovation and creativity by ensuring that competitive service providers, as well as application and content providers, have access to the necessary transmission facilities and services.

B. Continued Enforcement of the FCC's *Computer II* Rules Is Necessary

SBC consistently conflates IP services and applications with the "platforms" or networks over which they are provided. As noted, for instance, SBC defines "IP platform services" as consisting of both IP networks and the IP services and applications that ride over those networks.[23] This conflation allows SBC not only to ignore the important role the FCC's rules have played in fostering a competitive Internet, but also to argue that the facilities currently regulated under those rules should be treated the same as IP-based services that the Commission traditionally has not regulated. SBC offers no justification for this argument (or the underlying conflation of IP networks and applications), other than to assert that non-regulation of both networks and services is necessary (1) to ensure

[22] *See* Petition at 5-7; Declaratory Ruling Petition at 5-11.

[23] Declaratory Ruling Petition at 1 n.3, 28-29.

"the Internet's future development" and (2) "to create a rational, deregulatory framework for the Internet."[24]

SBC is wrong on both counts. First, as explained above, the future development of the Internet hinges on the Commission's continuing its policy of imposing economic regulation on bottleneck facilities – a policy that has allowed the Internet to experience the remarkable growth it has thus far enjoyed. Second, as also explained above, the most appropriate policy framework is a layers approach – *i.e.*, an approach that distinguishes between the physical layer, where bottlenecks still exist, and the application and content layers that are subject to competition and market discipline.

This distinction between the physical layer and the content and applications provided over lower layers is consistent with the enhanced/basic and information service/telecommunications service distinctions that have served the FCC well for over 20 years. The Commission has long recognized the importance of protecting enhanced service providers from abuse of market power by companies that control bottleneck access facilities. The *Computer II* rules, for example, require carriers with market power to provide basic transmission facilities to all enhanced service providers on a nondiscriminatory basis as a means of constraining the "potential for abuse of . . . market power through controlling access to and use of the underlying transmission facilities in a discriminatory and anticompetitive manner."[25] This approach is also consistent with the FCC's analysis in the *LEC Classification Order*: Even though the FCC found incumbent LECs to be non-dominant in the provision of interLATA services, it nonetheless imposed safeguards on incumbent LECs to prevent them from leveraging their control of upstream

[24] *Id.* at 29.

[25] *Computer II* ¶ 229.

local access facilities to harm competitors' ability to provide downstream interLATA services.[26]

By defining "IP platform services" in a manner that ignores the distinctions among different layers, SBC obscures the significant risk that a company with market power in one layer can act to impede competition in other layers. Specifically, a firm that possesses market power over physical access to the network (which SBC terms the "IP Platform") has both the incentive and the ability to restrict competitors' access to end users, effectively preventing end users from enjoying applications or content from specific providers. For example, left unchecked, SBC could provide an unfair advantage to its affiliated ISP by restricting the ability of non-affiliated ISPs to provide broadband Internet access to end users. Such anti-competitive behavior can be forestalled only if the Commission has in place rules that constrain carriers from exercising market power with respect to the physical layer in a manner that undermines competition in other layers.[27]

Furthermore, SBC's conflation of distinct layers also obscures the fact that DSL service, even if it "allows the customer to send or receive communications in IP format,"[28] is a telecommunications service that should continue to be subject to Title II regulation. In its Petition, SBC admits that DSL service, as an ATM-based transmission service, is a telecommunications service that should be offered "on a common carriage

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[26] *LEC Classification Order* ¶¶ 7, 10.

[27] As MCI explains in its comments on the *IP-Enabled Services NPRM*, layers that are subject to sufficient competition (*e.g.*, content and application layers, as well as the long-haul transport that is part of the physical and logical layers) should not be subject to economic regulation. *See MCI's IP-Enabled Services Comments* at 10-11.

[28] Petition at 10.

basis" in accord with Title II and *Computer II*.[29] In particular, SBC concedes that under *Computer II*, incumbent LECs have an obligation to provide ISPs with unbundled access to basic service elements, including DSL transport.[30] SBC also asserts, however, that this obligation should be limited to "legacy, non-IP-enabled frame relay and ATM services[.]"[31] Contrary to SBC's claim (which is unsupported by any argument or evidence), there is no principled basis for distinguishing between transport services based solely on the protocol involved. As the layers approach makes clear, DSL that "allows the customer to send or receive communications in IP format"[32] is functionally equivalent to DSL that is "ATM-based"[33] and should be treated in the same manner for regulatory purposes.

Instead of acknowledging the fact that some carriers have the ability to exploit their market power in certain layers, SBC contends that the Internet is "modular" and therefore cannot be dominated by firms with power over particular facilities.[34] The Internet does not exist in a vacuum, however. ISPs still rely on existing last-mile facilities, such as those controlled by SBC and the other Bell Operating Companies ("BOCs"), to connect end users to the Internet and to provide IP-based content and applications. This heavy reliance on last-mile facilities will remain unchanged for the foreseeable future.

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[29] *Id.* at 9.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 10.

[33] *Id.* at 9.

[34] Declaratory Ruling Petition at 10; Petition at 5.

SBC's spurious argument that access to IP-based services and the networks upon which they ride need not be regulated is analogous to a claim that because the long distance market is competitive, there no longer is a need to regulate access. In fact, without regulation of access services, incumbent LECs would have the incentive and the ability to prevent end users from obtaining services from alternative long distance providers and would be able to use their control over bottleneck facilities to re-monopolize long distance. This is precisely the problem that the FCC addressed in the *LEC Classification Order*.

The Commission should prevent potential abuses of market power by continuing to require dominant firms to provide nondiscriminatory access to bottleneck facilities. It is imperative that these facilities remain subject to economic regulation, including nondiscrimination requirements, until sufficient competition exists to ensure that market discipline can adequately replace government regulation. Therefore, the FCC should continue to enforce the *Computer II* rules for both IP-and non-IP-based services, or in the alternative, adopt streamlined new rules designed to achieve similar goals, such as those rules proposed by Earthlink, MCI, and AOL Time Warner in the *Broadband Framework* proceeding.[35] Under either alternative, the Commission should classify all IP

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[35] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, ¶ 44 (2002) (seeking comment on alternatives to the *Computer II* and *Computer III* requirements). In response to the *Broadband Framework NPRM*, Earthlink, MCI, and AOL Time Warner proposed that the FCC replace the existing *Computer II* and *III* rules with more streamlined safeguards. Specifically, the companies proposed that: (1) Each BOC would be required to offer to all ISPs, all of its high-speed network transmission services and capabilities on just, reasonable, and nondiscriminatory rates, terms, and conditions. (2) The BOC rates, terms and conditions would be publicly available, to ensure transparency. This could be achieved by either filing an interstate tariff, or posting information regarding rates, terms, and conditions on a publicly available web site. (3) An ISP could request that a BOC

applications (to the extent such applications are regulated) as information services that are subject to Title I regulation, but not Title II regulation.

As the foregoing discussion makes clear, in crafting a prudent layers-based approach to regulation, the Commission should not lose sight of the basic market power concerns that are the impetus for much of the FCC's current dominant carrier regulation. These concerns did not magically disappear with the advent of the Internet or of the "IP platform services" described by SBC. Rather, a layers-based approach to the issues raised by SBC dictates that the Commission should continue to impose economic regulation – including nondiscrimination requirements – on firms that possess market power in any particular layer.

III. SBC's PETITION FAILS TO SATISFY THE REQUIREMENTS OF SECTION 10

To satisfy the forbearance requirements of section 10(a) of the Act, SBC must demonstrate that Title II regulation of "IP platform services": (1) is not necessary to ensure that the charges and practices for such services "are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) is not necessary "for the protection of consumers;" and (3) is not necessary to protect the public interest.[36] The Commission must deny SBC's petition if it finds that "any one of the three prongs is unsatisfied."[37] In

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provide access to new network transmission services and capabilities, and the BOC would be required to either provide access within 90 days, or explain within 15 days the specific basis for the denial of the request. (4) The FCC would adopt a streamlined complaint process for violations of these particular rules. "Proposal to Streamline Title II Regulation of BOC Advanced Services to Promote Diverse Information Services," attached to *ex parte* letter from Donna Lampert, Counsel for Earthlink, to Marlene Dortch, FCC, CC Docket No. 02-33 (May 1, 2003).

[36] 47 U.S.C. § 160(a).

[37] *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

determining whether forbearance is consistent with the public interest under section 10(a)(3), section 10(b) requires the FCC to consider whether the requested relief will "promote competitive market conditions."[38]

SBC's Petition must be rejected. The rules from which SBC seeks forbearance are still necessary to prevent SBC and other carriers from abusing their market power. In support of its Petition, SBC provides only broad, unsubstantiated allegations that fail to satisfy SBC's burden of establishing a factual record demonstrating that the statutory criteria have been met. Continued regulation of bottleneck facilities in the physical layer remains necessary to ensure just, reasonable, and nondiscriminatory rates and to protect consumers. SBC's Petition therefore fails to meet the three prongs of section 10(a). Finally, SBC has failed to demonstrate that the requirements of sections 251(c) or 271 have been "fully implemented," as required by section 10(d).[39]

A. SBC's Petition Fails to Make the Showing Required by Section 10(a)

As an initial matter, SBC does not even identify the specific requirements from which it seeks forbearance, simply requesting that the FCC forbear "from applying Title II regulation to [IP platform] services to the extent that such regulation might otherwise be found to apply."[40] In addition, SBC fails to identify the specific aspects of "IP platform services" that are currently regulated. SBC compounds this vagueness by failing to provide evidence supporting its Petition. Not once in the Petition does SBC allege specific facts that demonstrate that its forbearance request satisfies any of the three prongs of section 10(a). As the FCC has held, "the decision to forbear from enforcing

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[38] 47 U.S.C. § 160(b).

[39] *Id.* § 160(d).

[40] Petition at 2.

statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met."[41] As demonstrated below, SBC has failed to develop the evidentiary record that would justify grant of its Petition.

The Commission may grant forbearance only if it concludes that marketplace forces are sufficiently well-established to prevent unjust, unreasonable and unreasonably discriminatory practices, and to protect consumers. In particular, sections 10(a) and (b) focus on whether the statutory provision or regulation to be eliminated is needed to prevent a carrier from exercising market power by, for example, charging excessive rates or engaging in unlawful discrimination.

This reading of the statute is consistent with many years of FCC decisions, in which the Commission concluded that refraining from regulation is appropriate if and only if the carrier has no market power.[42] As explained above, dominant firms such as SBC continue to exercise market power over last-mile facilities that ISPs use to connect

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[41] *PCIA's Broadband PCS Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 113 (1998).

[42] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Second Report and Order, 11 FCC Rcd 20730, ¶ 21 (1996) (concluding that mandatory tariffing requirements for interexchange carriers that lacked market power were not necessary because marketplace forces would ensure that the rates and terms for interexchange services would be just and reasonable, and that consumers and the public interest would be protected); *Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997) (forbearing from applying tariffing requirements to non-dominant carriers for the provision of exchange access services based on a finding that, without market power, such carriers are unlikely to behave anti-competitively because doing so would likely result in a loss of customers); *2000 Biennial Regulatory Review; Policy and Rules Concerning the International, Interexchange Marketplace*, Report and Order, 16 FCC Rcd 10647 (2001) (relying on increased competition for international interexchange services to support detariffing of non-dominant carriers).

consumers to the Internet and to provide IP-based content and applications. Where a carrier possesses market power over bottleneck facilities or services, the Commission has either declined to grant forbearance, or conditioned forbearance on continued non-discriminatory access to those critical inputs. For example, in the context of a request for forbearance from the separate affiliate requirements for nonlocal directory assistance, the FCC concluded that the BOCs continued to benefit from competitive advantages stemming from their position as the dominant providers in the local exchange and exchange access markets.[43] As a result, the Commission conditioned its grant of forbearance on continued compliance "with the nondiscrimination requirements set forth in section 272 with respect to the in-region telephone numbers [that the BOCs] use[] in the provision of nonlocal directory assistance service."[44] Absent non-discriminatory access to those listings, the FCC found that none of the requirements of section 10(a) could be met.[45]

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[43] *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, Memorandum Opinion and Order, 14 FCC Rcd 16252, ¶ 35 (1999) ("*USWC NDA Order*") (finding that because of their market power, the BOCs had "access to a more complete, accurate, and reliable [directory assistance] database than [their] competitors."); *BellSouth Petition for Forbearance for Nonlocal Directory Assistance Service; Petition of SBC Communications Inc. for Forbearance of Structural Separation Requirements and Request for Immediate Interim Relief in Relation to the Provision of Nonlocal Directory Assistance Services; Petition of Bell Atlantic for Further Forbearance from Section 272 Requirements in Connection with National Directory Assistance Services*, Memorandum Opinion and Order, 15 FCC Rcd 6053, ¶ 15 n.42 (2000) ("*BOC NDA Order*").

[44] *BOC NDA Order* ¶ 15 n.42; *USWC NDA Order* ¶¶ 35-37; *see also Bell Operating Companies; Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934*, Memorandum Opinion and Order, 13 FCC Rcd 2627 (Com. Car. Bur. 1998) (conditioning forbearance on continued access by unaffiliated entities to listings used to provide E911 and reverse directory services).

[45] *See USWC NDA Order* ¶¶ 35-37, 46-47, 53 (relying on continued non-discriminatory access to in-region directory listings to find that enforcement of the separate affiliate safeguards of section 272 was not necessary).

The FCC also declined to grant a petition requesting that it forbear from enforcing its depreciation accounting requirements, despite arguments that sufficient competition existed to ensure just and reasonable rates and protect consumers.[46] In that case, the Commission concluded that none of the three prongs of section 10(a) had been met because, among other factors, "forbearance would be likely to raise prices for interconnection and UNEs, (particularly those that may constitute bottleneck facilities) inputs competitors must purchase from incumbent LECs in order to provide competitive local exchange service."[47] The Commission has similarly declined to grant forbearance where it has determined that competition is insufficient to deter anti-competitive conduct.[48]

Under a layers approach, economic regulation is critical to ensure that companies with market power in the physical layer (including broadband platforms) cannot act anticompetitively to impede competition in the applications and content layers, which depend on access to the broadband platform. As noted above, SBC conveniently avoids discussing the market power that dominant carriers currently exercise over access

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[46] *See 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, 15 FCC Rcd 242, ¶ 54 (1999) (rejecting USTA's contention that the "thousands of interconnection agreements that incumbent LECs have negotiated with alternative providers of local exchange service, competition from wireless and personal communications services, and the freedom that cable companies and public utilities now have to enter telecommunications" were sufficient to constrain the incumbent LECs' ability to manipulate depreciation expenses).

[47] *Id.* ¶ 63.

[48] *See, e.g., COMSAT Corp. Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14083 (1998) (declining to grant forbearance from dominant carrier regulation where COMSAT would be free to increase its rates without losing customers because of a lack of competitive alternatives).

facilities by conflating IP-based applications with the underlying physical layer over which those applications are provided.

SBC also fails to muster facts in defense of its Petition. Instead, SBC relies solely on broad, unsupported claims regarding the status of competition for "IP platform services."[49] Determining whether incumbent LECs continue to possess market power over bottleneck access facilities in a given geographic market is a highly fact-specific inquiry. SBC has not even attempted to show that marketplace forces in local markets would be adequate to constrain their market power and ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; that consumers are protected; and that forbearance would be in the public interest. SBC's Petition therefore fails to meet its burden of providing sufficient evidence to satisfy any of the three prongs of section 10(a).

SBC seeks to compensate for its failure to adequately address the requirements of section 10(a) by relying on section 706 of the Act.[50] However, while the Commission

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[49] *See, e.g.*, Petition at 5, 10 (claiming, without citing any factual evidence, that "no single entity or class of entities dominates the provision of IP platform services" and that a "hands-off policy . . . has made the Internet's exponential growth possible."). Both claims, of course, are incorrect. As explained above, the BOCs continue to dominate the bottleneck facilities that ISPs need to provide Internet access; and the FCC's policies with respect to the underlying transmission facilities, as embodied in *Computer II* and *Computer III* requirements, have led to the openness, innovation, and extraordinary growth that characterize the Internet today.

[50] Petition at 11-12. SBC's reliance on the FCC's *Cable Modem NPRM* and the Ninth Circuit's *Brand X* decision is equally unavailing. *See* Petition at 3-4 (discussing *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem NPRM*"), *rev'd sub nom. Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003) ("*Brand X*")). Contrary to SBC's suggestion, the Ninth Circuit did not make a deliberate decision to "le[ave] intact" the FCC's tentative conclusion in the *Cable Modem NPRM* to forbear from the application of Title II regulation to cable modem service. Petition at 4. In fact, the NPRM in which the FCC made its tentative conclusion was not even before the Ninth Circuit; rather, the court in *Brand X* addressed only those issues that the FCC decided in the Declaratory Ruling that accompanied the

can consider the costs versus the benefits of regulation (including promotion of section 706's goals) as part of its public interest inquiry under section 10(a)(3), the results of such a cost-benefit analysis are relevant only to the Commission's analysis of section 10(a)(3). Since "the three prongs of § 10(a) are conjunctive,"[51] public interest considerations pursuant to section 10(a)(3) cannot obviate the need for the findings required by sections 10(a)(1) and (a)(2). In other words, even if section 706 somehow supported SBC's public interest claim under section 10(a)(3), SBC's Petition would still have to be rejected because it fails to satisfy the requirements of sections 10(a)(1) and 10(a)(2).[52]

B. The Requirements of Sections 251(c) or 271 Have Not Been Fully Implemented, as Required by Section 10(d)

Even if SBC had shown that it has satisfied section 10(a) (which it has not), section 10(d) of the Act bars the requested relief. Section 10(d) provides that the Commission may not forbear from applying the requirements of section 251(c) or 271 until it determines that those requirements have been "fully implemented." As MCI previously has explained,[53] the most reasonable construction of this requirement is that it

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NPRM. Moreover, the FCC's tentative conclusion involved the propriety of forbearance with respect to cable facilities that previously had not been regulated under Title II. *See Cable Modem NPRM* ¶ 95; *see also id.* ¶ 44 (FCC has applied Computer II and Computer III obligations "only to traditional wireline services and facilities, and has never applied them to information services provided over cable facilities.").

[51] *CTIA v. FCC*, 330 F.3d at 509.

[52] Tellingly, SBC itself acknowledges that "the Commission has not viewed section 706 as an *independent* source of forbearance authority[.]" Petition at 11-12 (emphasis in original).

[53] *See* Opposition of MCI, WC Docket No. 03-157, at 27-28 (Aug. 18, 2003); Opposition of MCI to SBC's Petition for Forbearance, WC Docket No. 03-235, at 22 (Dec. 2, 2003).

is satisfied "when markets are deemed competitive."[54] Specifically, the Commission should not consider section 10(d) satisfied until it can conclude that in a relevant geographic area, a robust wholesale market exists that enables competing providers to obtain access to the telecommunications services and facilities they require to enter the market without the need for continued enforcement of section 251(c) or 271.

SBC's Petition, however, does not attempt to satisfy the requirement of section 10(d). Nor could SBC make such a showing at this time, since dominant carriers such as SBC continue to exercise market power over the last-mile facilities that ISPs use to connect consumers to the Internet and to provide IP-based content and applications. Absent such a showing, the Commission must reject SBC's Petition regarding forbearance from the requirements of sections 251(c) and 271.

[54] 141 Cong. Rec. S. 7942, 7956 (June 8, 1995) (statement of Senator McCain) (quoting from Heritage Foundation letter).

IV. CONCLUSION

Because SBC has failed to demonstrate that sufficient competition exists to prevent the exercise of market power with respect to bottleneck access facilities in the relevant geographic and customer product markets, the relief requested in the Petition must be denied.

Respectfully submitted,

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May 28, 2004

Certificate of Service

I, Ruth E. Holder, certify that on this 28th day of May, 2004, I caused true and correct copies of the foregoing Opposition of MCI to SBC's Petition for Forbearance to be mailed to:

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